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No. 86-288

In The
Supreme Court of the United States
October Term, 1986

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Petitioner,

vs.

STEPHEN R. MATTATALL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

REPLY BRIEF OF THE PETITIONER

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Now comes Petitioner, the State of Rhode Island and Providence Plantations, (hereinafter referred to as the State), by its attorney, and replies to the Respondent's brief-in-opposition to certiorari as follows.

I. THE RHODE ISLAND SUPREME COURT ERRONEOUSLY APPLIED THE SIXTH AMENDMENT EXCLUSIONARY RULE TO VOLUNTARY, UNSOLICITED STATEMENTS OF THE DEFENDANT MADE TO AN ACQUAINTANCE.

In the instant case, a private citizen, John Carney, engaged in telephone conversations with Respondent Stephen Mattatall (hereinafter referred to as the Defendant) regarding the Defendant's involvement in the death of John Scanlon. These conversations occurred at a time when police officers were in Carney's home, and they overheard the conversations on an extension telephone. In reviewing this situation for Sixth Amendment purposes, the Superior Court trial justice found as a matter of fact that the police played no role whatsoever in initiating or directing the resultant conversations:

> There is no evidence on the record that there is any suggestion by the police as to what Mr. Carney should say, or how he should direct the conversation, or that he should raise the issue of the Scanlon shooting. There was nothing at all. *The police role was entirely passive. They listened. They gave no instructions.*

Tr. at 277-78 (emphasis added). In sum, then, based upon the facts as found by the trial judge, this conversation occurred without any police involvement or intervention.

Without disputing the accuracy of this factual conclusion, the Defendant purports to disagree with the facts

as set forth in the State's petition for certiorari. Defendant contends that the trial judge's findings were erroneous, because the record reveals that *Mr. Carney* actively participated in the conversations and actually discussed the homicide with Defendant. This conduct, Defendant suggests, demonstrates that the Sixth Amendment has been violated. The difficulty with the Defendant's contention is that it fails to address the absolutely passive role played by the police in these conversations. Rather than dispute the findings of the trial judge on this point, Defendant chooses to ignore the passivity of the police. Of course, the only police involvement in this case was listening. Defendant does not contend that the police arranged for the conversation or facilitated it in any way. Nevertheless, because the Sixth Amendment right had attached, Defendant contends that any statements he made may not be admitted into evidence against him, even though police misconduct played no role in producing the statements. With all due respect to the Rhode Island Supreme Court, the State suggests that the Defendant's position is utterly foreign to any concept of the Sixth Amendment that has been endorsed by this Honorable Court.

Defendant's position would appear to insulate from admissibility and statement made by a Defendant once the Sixth Amendment right to counsel has attached, whether the police have played an active or a passive role. After all, the trial judge found—and the Defendant does not dispute—that the police role in this case was totally passive. There is scant difference between a case such as this one—where the police passively listen—and one in which the citizen-witness makes a post hoc report of an incriminat-

ing conversation. The State cannot conceive that this Court would endorse a rule that would preclude such citizen-witnesses from reporting conversations to the police and testifying regarding their contents. Such a rule, however, would seem to be encompassed in the decision below. Yet this reasoning is antithetical to the views enunciated by this Court in *Kuhlman v. Wilson*, 91 L. Ed. 2d 364 (1986):

> [A] defendant does not make out a violation of [the Sixth Amendment] simply by showing that an informant, either through prior arrangement or voluntarily, reported incriminating statements to the police. Rather, the defendant must demonstrate that *the police and their informant* took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

Id. at 384-85 (emphasis added). The State respectfully submits that if the rule of *Wilson* has any meaning at all, a defendant must be required to demonstrate some activity by the police in eliciting the incriminatory statements. Where, as here, the police merely listened, *Wilson* requires that the motion to suppress be denied.

This case represents a dangerous departure from the law as enunciated by this Court in *Wilson* and its precursors. The Rhode Island Supreme Court has adopted a rule of *per se* exclusion that applies to any statements made by a defendant after attachment of the Sixth Amendment right, regardless of the degree of police activity in producing the statement. Such a rule must not stand. The petition for certiorari should be granted.

II. IN A CASE WHERE NO COURT HAD EVER DETERMINED THAT DEFENDANT'S ARREST WAS UNLAWFUL, THE RHODE ISLAND SUPREME COURT ERRED BY INVOKING THE FOURTH AMENDMENT EXCLUSIONARY RULE TO SUPPRESS A DEFENDANT'S VOLUNTARY STATEMENT.

Disputing the premise of the State's petition, the Defendant claims that the Rhode Island Supreme Court actually made a determination regarding probable cause in this case. The Defendant has fallen victim to the same logical flaw that befell the Rhode Island Supreme Court: the unwarranted assumption that because the police did not believe that they were arresting the Defendant, they must have lacked probable cause to arrest. The State has addressed this issue at length in its petition for certiorari. It suffices at this stage to point out the revolutionary nature of the Defendant's position on this issue. In Defendant's view, the *subjective belief* of the arresting police is the controlling factor in determining whether or not an arrest is lawful. Defendant's position could have a remarkable effect upon the exclusionary rule and its application. Indeed, under the Defendant's logic, had the police officers in this case merely testified to a subjective belief in the existence of probable cause, their subjective statements would govern and the motion to suppress would be denied.

Defendant's view of this issue is simply erroneous. This Court has held on numerous occasions that the existence of probable cause is an objective question. *E.g. Draper v. United States*, 358 U.S. 307, 313 (1951) (promulgating "reasonable man" standard for probable cause); *Brown*

v. Texas, 443 U.S. 47, 51-53 (1979) (reasonableness of detention must rest on objective criteria). By rejecting the need for an objective determination of probable cause, the opinion of the Rhode Island Supreme Court has departed from the controlling law as enunciated by this Court. Certiorari should be granted to review the lower court's erroneous judgment.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition for certiorari, this Honorable Court should grant a writ of certiorari in order to review the judgment of the Rhode Island Supreme Court.

Respectfully submitted,

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

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